In the circimstances the plaintiff is entitled to the amount claimed and there will be judgment accordingly with costs.

Judgment for the plaintiff.

DIANA ELLIS v. KHOO EK NEO AND ANOR. *

[Orig. Civ. Juris. (Evans, J.) May 31, 1950]

[Singapore — Originating Summons No. 40 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, 1949, s. 11 — Application of former Mortgagee for reinstatement of security and avoiding of a Reconveyance executed during Japanese occupation — Claim by subsequent Purchaser against Mortgagor for damages for breach of statutory covenants for title implied in the Assignment from the Mortgagor to the Purchaser made subsequent to the Reconveyance.

Certain leasehold premises were prior to the Japanese occupation of Singapore mortgaged by the Mortgagor (Khoo Ek Neo) to a Mortgagee (Diana Ellis) who was absent from Singapore during the Japanese occupation. The Mortgagor on or about the 27th September 1944 agreed with a purchaser (Tham Khiam Chow) to purchase the property and a written sale contract was prepared by the Mortgagor-Vendor's Solicitor and was signed both by the Mortgagor-Vendor and by the Purchaser. This agreement for sale expressly set out that "the Vendor shall sell and the Purchaser shall purchase the lands and premises described in the Schedule hereto free from incumbrances".

The agreement also provided in Clause 12 that "The purchaser hereby acknowledges that the Reconveyance of the existing mortgage in favour of Diana Ellis will be executed by the Custodian of Enemy Property and no objection or requisition shall be made in connection therewith whatever". A Reassignment of the property from the Custodian of Enemy Property for the Municipality of Syonan to the Mortgagor free from the Mortgage debt was made on the 12th February 1945 and registered in the Registry of Deeds in Singapore. Subsequently on the same day the Mortgagor assigned the lands and premises included in the mortgage to the Purchaser by the following words namely "the Vendor hereby assigns unto the Purchaser All the said lands and premises described in the Schedule hereto To hold the same unto the Purchaser her executors administrators and assigns for all the residues now unexpired of the several terms of 999 years and 99 years . . . . . ."

Held, that the Assignment to the Purchaser imported the statutory covenants for title set out in section 7(1)(a) of the Conveyancing and Law of Property Ordinance (Cap. 113) and that those covenants being unqualified, not having been varied or altered by anything contained in the Assignment, were absolute and binding without regard to consideration or circumstances.

Held, therefore that since the breach of those covenants had not been disputed, the Purchaser was entitled to a declaration that she was entitled to recover against the Mortgagor damages for breach of the said covenants for title implied in the Assignment by the Mortgagor to the Purchaser.

Cases referred to:—

(1) *Alexander v. Rayson* (1936) 1 K.B. 169 at p. 178.

(2) *Parry v. Aluminium Corporation Ltd.* (1940) W.N. 44 at p. 46.

(3) *Laurie v. Raglan* (1942) 1 K.B. 152 at p. 155.

(4) *Page v. Midland Railway Co.* (1894) 1 Ch. 11.

(5) *Great Western Railway v. Fisher* (1905) 1 Ch. 316 at p. 322.

(6) *Eastwood v. Ashton* (1913) 2 Ch. 39 at p. 51; H.L. (1915) A.C. 900.

(7) *Wise v. Whitburn* (1924) 1 Ch. 460.

(8) *Debenham v. Sawbridge* (1901) 2 Ch. 98.

(9) *Clayson v. Leach* 6 L.T.R. 69.

(10) *Scott v. Coulson* (1903) 2 Ch. 249.

ORIGINATING SUMMONS.

J. C. Cobbett for the Mortgagee, the Plaintiff.

Philip Hoalim for the Mortgagor, the 1st Defendant.

John Laycock and *Denis Murphy* for the Purchaser, the 2nd Defendant.

Cobbett contended that the Mortgage having been dischargd by a reconveyance made by the Japanese Custodian was *prima facie* void under Section 11(1) of the Debtor and Creditor (Occupation Period) Ordinance. Proviso (b) to that sub-section had no application to the present case. He did not dispute that the 2nd Defendant was a *bona-fide* purchaser for value; nor did he dispute that the Reconveyance was one separate transaction and the sale another separate transaction and he did not suggest that the Custodian had intervened in the sale. But the reconveyance to the Mortgagor had not been made by "the Mortgagee or his agent" in the words of the proviso and so there was nothing in the proviso to take this case out of the general terms of sub-section 1 of section 11 and the reconveyance therefore must be void.

Philip Hoalim did not oppose Cobbett's contentions and submitted to an order being made against his client in favour of the Plaintiff.

John Laycock contended that the 2nd Defendant was a *bona-fide* purchaser for value and that after the discharge or purported discharge of the property by the reconveyance it had been transferred to the 2nd Defendant as a *bona-fide* purchaser without the intervention of the Custodian "in the transaction", which must mean the transfer of the property to the purchaser, that is to say the assignment on sale. He

* The first defendant has given notice of appeal and the appeal is pending. — *Ed. M. L. J.*

contended that in the last five lines of the proviso the words "the reconveyance to the Mortgagor by the Mortgagee or his agent" were wide enough to include the Custodian, who was in fact a sort of statutory agent for the Mortgagee by virtue of his position.

Cobbett in reply pointed to the definition of "agent" in Section 2 of the Ordinance which excluded a Custodian or liquidation officer and also referred to Section 11(1) which expressly distinguished between "a reconveyance made by the Mortgagee or by his agent or by the Custodian or a liquidation officer". He also pointed out that he was not interested in the contention between the 1st Defendant and the 2nd Defendant on the subject of damages for breach of implied covenants for title and asked the leave of the Judge to withdraw when the arguments on his side of the case were concluded.

The Judge then allowed Cobbett to withdraw.

Philip Hoalim for the 1st Defendant then submitted that on the claim relating to damages for breach of the implied covenants for title, the 2nd Defendant was in the position of a Plaintiff vis-a-vis the 1st Defendant and that the 2nd Defendant must open the case.

John Laycock for the 2nd Defendant did not oppose this.

The Judge then ruled that the 2nd Defendant must begin and open her case against the 1st Defendant.

John Laycock submitted that by virtue of Section 7(1)(a) of the Conveyancing and Law of Property Ordinance (Cap. 118) the usual four statutory covenants for title namely good right to convey, quiet enjoyment, free from incumbrances, and further assurance were deemed to be included and were implied in every conveyance for valuable consideration other than a mortgage, by every person who conveys and is not expressed to convey in a fiduciary capacity. The definition of "conveyance" in Section 2 of the Ordinance includes an Assignment. Although by Section 7(5) of the Ordinance, such implied covenants may be varied or extended by deed, there had in this case been no such variation of the implied covenants and therefore in this case the Vendor-Mortgagor was liable for damages of breach of the implied covenants for quiet enjoyment and free from incumbrances.

The affidavit evidence was then read and the 2nd Defendant called her witnesses for cross-examination. After taking oral evidence, the 2nd Defendant then closed her case.

Philip Hoalim for the 1st Defendant then opened his case and submitted that there was no case for him to answer.

John Laycock then submitted that if Counsel made such a submission, he must be taken to have elected to call no further evidence in case the Court ruled against him on the submission. He referred to *Alexander v. Rayson*[1]; *Parry v. Aluminium Corporation Ltd.*[2]; *Laurie v. Raglan*[3].

Hoalim then elected to call no further evidence.

The Court ruled that there was a case to answer.

Philip Hoalim for the 1st Defendant opened his case.

John Laycock for the 2nd Defendant in reply: I agree that if the Court holds the Plaintiff-Mortgagee is not entitled to the relief which she seeks against the 1st Defendant-Mortgagor, then the 2nd Defendant is not entitled to the relief which she seeks against the 1st Defendant. As to the implied covenants for title, the Law of Property Act made no changes in the implied covenants set out in the Conveyancing and Law of Property Act 1881; see Section 76 of the Act of 1925 and the Second Schedule to the Act, part I; the implied covenants therein set out are word for word the same as those in the Act of 1881. They are also the same *mutatis mutandis* as those in the local Ordinance. Therefore the English authorities since 1881 are all applicable in a local case. None of the cases quoted by Hoalim is a case on damages for breach of implied covenants for title; they all deal with such matters as compensation for errors of description, or misrepresentations, or rectification or other matters quite irrelevant to a simple claim for damages for breach of implied covenants for title. It is however argued that clause 12 of the Sale contract disentitles the 2nd Defendant from claiming such damages. That contract has however been superseded and extinguished by the conveyance. *Dart* on Vendors and Purchasers 8th Edition p. 683, 684. But the law is plain that even if a conveyance is so drafted as to give express notice to a purchaser as well as to the Vendor that there is a defect in the Vendors' title to make the conveyance, still the implied covenants for title remain in full force in the absence of any express modification of the same in the deed and the Vendor cannot escape liability thereunder on the ground that the purchaser took the property with notice or knowledge of any defects in title. *Page v. Midland Railway Co.*[4]; *Great Western Railway v. Fisher*[5] per Buckley J. "This implied covenant, unless qualified, gives rise

to a right to damages". *Eastwood v. Ashton*[6] per Sargant J. "Indeed I am inclined to think that even if the defect in title here had been discovered between the contract and the conveyance, and it had accordingly been recognized that the introduction of the statutory covenants for title might give the purchaser a right to damages equivalent to compensation for loss of the disputed strip, the purchaser would in a specific performance action have been held entitled to a conveyance of the property described in the particulars in such a form as to give him the benefit of the statutory covenant".

See also *Dart* on Vendors and Purchasers 8th Edn. p. 671, 672. The decision of Sargant J. in *Eastwood v. Ashton*[6] was reversed by the Court of Appeal but was restored by the House of Lords[6] *Wise v. Whitburn*[7].

If the Vendor did not wish to be bound by the implied covenants for title, he should have inserted in the Assignment apt words to vary and modify the statutory covenants. As to a purchaser's remedies on a Vendor's implied covenants for title see *Dart* on Vendors and Purchasers 8th Edn. p. 661 *et seq.*

Cur. Adv. Vult.

Evans, J. : — This is an Originating Summons taken out by Mrs. Ellis under the Debtor and Creditor (Occupation Period) Ordinance 1949 asking for orders declaring a reconveyance of 12th February 1945 made by the Custodian of Enemy Property of the Municipality of Syonan and Khoo Ek Neo is void and charging the property formerly mortgaged with a sum calculated in accordance with that Ordinance.

Khoo Ek Neo is the first Defendant and the second Defendant is a purchaser to whom Khoo Ek Neo assigned her leasehold interest in the property on the same date aforesaid.

The first Defendant did not deny the plaintiff's claim. Counsel for the second Defendant criticised severely the wording of the Ordinance saying that if the legislature intended that all reconveyances by the Custodian for the Municipality of Syonan should be void it was strange that it could not say so. When asked however if he said that the words "or the Custodian" should be read into Section 11(1) of the ordinance after "his agent" in the body of the proviso, he replied that he did not, but argued that agent here had a wider meaning than as used elsewhere, and as defined. The alternative seems to me no more valid than the suggestion. If one does violence to the wording of the section, the other is equally at variance with the definition and the terminology. Moreover there would seem no justification whatever for such abuse of language as to describe the custodian as agent of the plaintiff who did not appoint him, nor ratify his deeds, nor draw direct benefit from any of his acts. Mr. Laycock is I think unduly hard on the Legislature. Were it dealing with but one class it might have used language as short as his. Section 11(1) deals with four classes saying that A, B, C and D are void, then going on to provide that in some circumstances A and B are not void. This seems to me a sufficiently clear way of saying that C, reconveyances by the Custodian, are void as against the mortgagor his personal representatives or anyone claiming under him. There can in my opinion be no doubt the plaintiff is entitled to the orders sought.

There remains what Counsel for first Defendant called the second Defendant's claim against her, but which seems to be first adumbrated in her own affidavit of 5th April 1950 as the latter's undertaking to indemnify her.

Before me however the matter was treated as a claim by second Defendant against first Defendant for damages for breach of the implied covenants in first Defendant's assignment already mentioned, and there is no objection taken to the matter being so raised. The second Defendant gave evidence and so did her husband and Mr. Chong Thutt Pitt who acted as solicitor for the two Defendants in their transactions herein. The first Defendant elected to call no evidence but relied on the law.

This evidence added little to what appeared on the face of the documents, and I am not satisfied that the recollection of any of the witnesses can be trusted as to any matters of detail in the events of 1944 to which they mainly testified. It appears however that Mr. Chong Thutt Pitt was acquainted with both parties; and in April suggested the transaction to the mortgagor and at much the same time found the second Defendant's husband as a possible purchaser. These were introduced in April, but nothing more happened for some months, possibly because the second Defendant regarded the price asked as too high. There is no reliable evidence of how the purchase price was fixed, but on 27th September or thereabouts the parties entered into the Agreement of Sale which was produced and which must *prima facie* be read as containing all the parties' stipulations concerning that transaction. I have no doubt that all were then, and had been, for at least some days, aware of the

plaintiff's rights, and of the intervention of the Custodian for the Municipality of Syonan. This agreement contains neither stipulation for compensation, nor an indemnity to the vendor against any claim by plaintiff. It does contain an undertaking by purchaser to make no objection to the title on the ground of the reconveyance of the Custodian. This reconveyance was ultimately obtained and the vendor made an assignment of her interest on the same day. Into this assignment Section 7 of the Conveyancing and Law of Property Ordinance imports the covenants on the breach of which the second Defendant claims. These covenants are, in this colony, imported without the use of any word which might draw attention thereto, and without regard to the particular circumstances or to the discretion of the Court. In these circumstances most of the considerations raised by the first Defendant are of little relevancy.

Counsel for first Defendant asked some questions regarding an undertaking to indemnify, but proved nothing, nor, in the absence of fraud, could he rely on anything of the kind, in view of the omission of any such term in the Contract of Sale. Most of his case rested on this contract, but he has not alleged nor proved any breach, nor made any counterclaim. He seemed anxious to shew that the second Defendant well knew of the plaintiff's interest and entered into the agreement with knowledge of a defect of title. This appears from the express stipulation to accept the Custodian's reconveyance, which in fact was obtained and on the strength of which the first Defendant assigned. Only two of the cases to which he referred seemed in any way apposite. In both purchasers failed to obtain compensation after completion in respect of a defect of title, but in *Debenham v. Sawbridge*[8] as Mr. Laycock pointed out the vendor conveyed as trustee so that there were no implied covenant such as those on which the second Defendant here relies, while in *Clayson v. Leach*[9], although the facts are not so clear, the words of Bowen L.J. show that, in that case also, the covenants were varied, so that neither case could possibly raise a suggestion that an action on the covenants would not in such case lie. The second Defendant cited ample authority to the contrary, which extends to cases in which the defect was known to both parties, even when such defect included rights of a third party which were known not to have been extinguished. *Page v. Midland Railway Company*[4], *Great Western Railway Company v. Fisher*[5] and *Wise v. Whitburn*[7].

I have no doubt both parties at all material times were well aware of the plaintiff's title, and of the stipulation and its meaning, and all these matters were within the knowledge of their Solicitor. It has not been questioned that the Plaintiff's claim would be a breach of a covenant for quiet enjoyment, or of freedom from incumbrances. These covenants are implied regardless of the circumstances and of the parties knowledge or intention. A claim upon them is independent of the contract of sale; obligations under the latter, if broken, might give rise to some counterclaim, but are not *prima facie* any defence to a claim on the covenants, nor has Mr. Hoalim established any connection between them.

First Defendant's counsel argued on the effect of alleged representations by second Defendant or her Solicitor. The second Defendant does not rely on misstatement fraudulent or otherwise. The first Defendant succeeded in proving none from the witnesses called. His client's affidavits are varied, and conflicting, as to the suppositions on which she acted. In paragraph 2 of her first affidavit dated 5th April 1950 she speaks of the promise of indemnity of which I have spoken. In paragraph 2 of the longer one of 10th May 1950 she speaks of a belief that the Japanese Custodian's reconveyance would free the property of the mortgage, and in paragraph 7 of the same she speaks of a similar belief, that the reconveyance and assignment "would remain undisturbed by the legitimate sovereign", but at the same time reaffirms an agreement to indemnify. In the shorter affidavit of the same day she seems to imply she sold because she was advised the market was good, and again refers to a verbal promise of indemnity.

The defending counsel has raised various considerations without bringing them directly into opposition to plaintiff's claim which remains mainly undefended despite his efforts. There is no contract of indemnity proved; the agreement of sale is silent on the matter. A promise cannot amount to a representation of fact. The case of *Debenham v. Sawbridge*[8] is cited by the learned editors of *Dart* on Vendors and Purchasers (7th Edition, page 808) as authority, with *Scott v. Coulson*[10] for the proposition that mutual mistake may be a ground for rescission even after conveyance. The first Defendant has never clearly asked for rescission, but, in any case, I can see no such mistake.

The statements in the first Defendant's affidavits must be read in the light of the documents to which she is a party. The Reconveyance contains a number

of recitals the legal significance of which is very far from obvious, nor has the evidence given them any such meaning. It is, however, clear that the guarantor makes no pretence to any title nor power of disposition. If any implication were to be drawn from the words used, then "custody and control" must be read as a denial of either. The first Defendant's beliefs as to the acts of the legitimate sovereign are wholly irrelevant. No act of that sovereign is in question, but the primary question is whether the true owner is bound by a reconveyance made by one not, even, professing to have title to make it. She does not say how or by whom these beliefs were induced; nor could she have had any reasonable belief in the legal power of the Japanese Custodian of Property to reconvey. This reconveyance is the document the second Defendant is bound to accept, and has accepted, with a recital of incunbrances which are not legally discharged. On that the first Defendant has made an assignment importing the covenants on which the second Defendant relies. I should not have believed that any reasonable persons, regardless though they may be of the interests of others, would with the knowledge of events then current in Singapore have knowingly made these covenants. Owing to the course the defence has taken the possibly more substantial question of how far the parties are bound by undertakings both knew or should have known were illusory was not considered. The case would not seem to differ from the promise of an impossibility. The second Defendant relies on these covenants, which are absolute and binding without regard to consideration or circumstances. The plaintiff claims on her mortgage from first Defendant; the breach is not denied. I am therefore unable to see any defence to this claim and make the declaration asked.

Order accordingly.

ROBINSON & CO. LTD. v. REX.

[App. Crim. Juris. (Murray-Aynsley, C.J) June 21, 1950]

[Singapore — Magistrate's Appeal No. 69 of 1950]

Weights and Measures Ordinance (Cap. 204), s. 13(1)(b) — Scope of requirement of stamping under the Ordinance — Whether domestic or family scales come within the ambit of the Ordinance.

In this case the appellants were charged with selling a family scale which had not been stamped under the Weights and Measures Ordinance and were convicted of an offence under section 13 (1) (b) of the Ordinance. The appellants appealed.

Held, that the requirement of stamping under the Weights and Measures Ordinance only applied to instruments for weighing or measuring which can usually be expected to be used in trade and did not apply to ordinary domestic apparatus.

MAGISTRATE'S APPEAL.

K. Gould for the appellants.

A. V. Winslow (D. P. P.) for the Crown.

Murray-Aynsley, C. J. : — In this case the appellants were convicted of an offence against section 13 (1) (b) of the Weights and Measures Ordinance, Cap. 204.

The material parts of the section read as follows :—

"13 — (1) Any person who — . . . . . .

(b) sells any weight, measure or instrument for weighing which is not stamped under this Ordinance; or . . . . . .

shall be liable to a fine not exceeding one hundred dollars, or in the case of a second offence two hundred and fifty dollars."

The facts were as follows. An Inspector belonging to the Weights and Measures Branch found in a certain hardware store of this city an apparatus or instrument for weighing. It had been sold to the proprietors of that shop by the appellants. It was not stamped under the Ordinance.

The particular instrument was an ordinary domestic or family scale. It could be adjusted by means of the centre pivot. Therefore it should not in any case be stamped and could not be used for trade. Section 5 of the Ordinance requires the stamping of instruments for weighing, etc. if they are used for trade. If they are not used for trade there is no requirement for stamping.

Now it is notorious that there are many instruments for weighing which are not intended to be used for trade. Examples are the ordinary kitchen scales used in the course of preparing food and the bathroom scales which valetudinarians use to weigh their persons. If these were made to a standard of accuracy necessary for purposes of trade they would be too expensive for most people. I think, therefore, that the section must, if possible, be read in a way that makes it possible to avoid this absurdity, which is bad enough in the case of instruments for weighing and becomes quite fantastic when applied to measures. Most cooks use tea-cups as measures.

I think therefore that the requirement of stamping under this Ordinance must be taken as limited to instruments that can normally be expected to be used in trade and not extended to ordinary domestic apparatus.

The appeal is allowed and conviction quashed. Fine, if paid, to be refunded.

Appeal allowed.